

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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BRYAN SEXTON, 13-CV-08557 (AT)

Plaintiff,

v.

VINCENT LECAVALIER,

Defendant

-----X

MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO HOLD  
DEFENDANT IN CONTEMPT UNTIL  
HE COMPLIES WITH COURT'S  
ORDER.

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## FACTS

On December 10, 2013, this Court issued an order to defendant directing that he produce “all responsive documents located on any computer in native format as required by the Subpoena...” (Para. (ii) of the first ordering paragraph)(1, Ex. A). (All references are to paragraphs in Trager declaration and exhibits attached to it). The order directed that this production be done by December 12, 2013 at 5 PM. (Ex. A). Defendant failed to do this. Instead defendant’s counsel sent an affidavit from her firm’s IT Director stating that “it is not possible to electronically produce Google Gmail since we do not manage the infrastructure, but rather it is managed and controlled by Google.” (4, Ex. C). As demonstrated by the cases set forth below, this is simply incorrect. All it would have taken to copy was a few clicks to transfer the emails and their attachments found in Mr. Lecavalier’s laptop to a disc, which disc should have been delivered to plaintiff’s attorneys. (5).

### **I. THIS COURT HAS THE AUTHORITY TO ENFORCE ITS ORDER BY CITING DEFENDANT FOR CONTEMPT.**

“Courts have the inherent power to enforce compliance with their lawful orders through the imposition of civil contempt sanctions. *Shillitani v. United States*, 384 U.S. 364, 370 ... (1966). The exercise of this power to enforce compliance with a lawful order is appropriate when ‘1) the order is clear and unambiguous; 2) proof of noncompliance is clear and convincing; and 3) the party has not been reasonably diligent and energetic in attempting to comply with the order.’ *Sec. and Exch. Comm’n v. Muselia*, 818 F. Supp. 600,601-02 (1993).

*Ginter Logistics Service Co. , Ltd v. ACH Freight Forwarding, Inc.*, 2010 U.S. Dist. Lexis 113934 (S.D.N.Y. 2010). This also applies to subpoenas under FRCP 45. *Ginter, supra*. These standards have been met here.

## **II. THE ACTION REQUIRED BY DEFENDANT WHICH WAS NOT PERFORMED.**

Emails exist on Lecavalier's laptop. (7). For purposes of this case, as they exist on this laptop is native format. To produce in native format, simply requires moving those emails and attachments, which Mr. Lecavalier claims exist on his laptop, to a disc and delivering that disc with these documents on it to plaintiff's attorney. As the court in *Covad Communications Co. v Revonet, Inc.*, 254 F.R.D. 147, 150 (D.C.D.C. 2008) held: "the e-mails at issue exist in what I have called their native format and can be copied onto a CD with a couple of keystrokes."

Gmail, in so far as this case is concerned, does not operate in a different manner and is also required to be produced in the same way. See, *Sekisui American Corp. v. Hart*, 945 F. Supp. 2d 494, fn. 71 (S.D.N.Y. 2013), noting that the "MIT Media Lab recently developed a tool demonstrating the significance of email meta data. The tool analyzes the metadata from the user's Gmail account and visualizes that data, revealing who the user talked to, how often, and when, among other things." The failure to preserve the ESI data for emails was held to constitute a destruction of evidence by the court in *Sekisui*.

In *S2 Automotion LLC v. Micron Technology, Inc.*, 2012 U.S. Dist. Lexis 120097 (D. N.M. 2012)(at 74-75) the court found that native format was the file structure which opened and created the document and that email was routinely stored in one of four recognized systems. And courts routinely grant a request for production in native format. See, *Saliga v. Chemtura Corp.*, 2013 U.S. Dist. Lexis 167019 (D. Conn 2013), recognizing the importance of metadata with respect to emails and directing production in native format because plaintiff requested it.

In short, there was a simple method for complying with the request in the subpoena for production of documents found in Lecavalier's computer (including emails) in native format. And when directed by this Court to produce in native format, all that Lecavalier would have needed to do was to transfer the emails and related documents to a CD and produce that CD. Instead, Lecavalier has deliberately chosen not to produce in this form. There is no excuse for this .

### CONCLUSION

For the foregoing reasons, the relief requested by plaintiff to hold defendant in contempt and impose penalties until he performs should be granted.

Dated: January 3, 2014  
New York, NY

Respectfully submitted,

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